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IN THE

Supreme Court of the United States

No. 249

OCTOBER TERM, 1934

LIVINGSTON H. McCREA,

Petitioner,

AGAINST

UNITED STATES OF AMERICA, as owner of the *S.S. American Shipper*, Engines, Tackles, Apparatus, Etc.,

Respondent.

PETITION FOR REHEARING.

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Supreme Court of the United States

No. 249—October Term, 1934.

Livingston H. McCrea,
Petitioner,

vs.

The United States of America, as owner of the *S.S. "American Shipper"*, Engines, Tackle, Apparatus, Etc.

PETITION FOR REHEARING.

Comes now the above named petitioner and presents this his petition for a rehearing of the above entitled cause, and in support thereof respectfully shows:

There Was No Reasonable Cause for the Refusal to Pay the Wages Earned.

The record shows the petitioner remained on the *S.S. American Shipper* for four days after he made his demand for discharge and payment of wages earned, and the master knew or should have known he was there.

Two questions as to the construction of statutes relating to seamen were presented in this appeal. The first was whether the provision, contained in R. S. 4529 (46 U.S.C. 596), for the recovery of double wages by a seaman whose demand for wages earned has been refused, is compensatory or is the imposition of a penalty; and whether, if a penalty, an action may be maintained by him

against the United States. It is in regard to this issue only that a rehearing is requested.

In its decision, handed down in this cause on January 7, 1935, the court did not go into the merits of the questions presented under R. S. 4529 (46 U.S.C. 596) as to whether or not the relief provided for by said section was compensation or wages, or a penalty; or whether, if a penalty, the respondent waived its sovereign immunity by going into business in competition with private owners or by the Suits in Admiralty Act.

In its decision the court took the position that there was no evidence in the record to show when the cargo of the *S.S. American Shipper* was discharged; or to show that the petitioner remained on board the vessel for four days after his demand for wages earned; or that he left his address with the master or made any effort to get in touch with the master during the four-day period; or that the petitioner made any effort to show to the master that he persisted in his demand for discharge and payment of the wages earned.

In its opinion, the court said (p. 5):

> "Since it does not appear in the present case when the cargo was discharged, the time within which the master could pay the wages due and thus avoid liability for double wages cannot be taken to be less than four days from the time of arrival."

The court said further (p. 6):

> "In the circumstances, he did not unreasonably defer action by fixing the following day and the Consul's office as the time and place for his decision. The failure of petitioner to keep the appointment and to communicate with the master again, after rejection by the Consul of petitioner's demand, left the master uninformed whether or not petitioner still persisted in his demand. His departure from the vessel *on the following day, without leaving an address,* precluded payment of the wages due within the four days which the statute allowed." (Italics ours.)

R. S. 4529 (46 U.S.C. 596) provides (so far as is applicable herein):

> "The master or owner of any vessel * * * shall pay to every seaman his wages * * * in case of vessels making foreign voyages, * * * within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens * * *."

Apparently the decision of the court is based solely upon the fact that it believed the seaman left the vessel on February 28, two days after making his demand, and did not return, or leave any address. This is not correct.

It Is Respectfully Submitted That There Has Been Some Misapprehension of the Record.

The testimony presented by the respondent, as well as that introduced by the petitioner, shows that the petitioner was on board the *S.S. American Shipper,* and that the master or other officers knew he was there, for a period of four days after his discharge and his demand for his wages earned was made, namely, from February 26 until March 1, and that they knew he was persisting in his demand.

The court will take judicial notice that 1928 was a leap year. The dates involved are as follows:

February	26	1928	—Sunday
"	27	"	—Monday
"	28	"	—Tuesday
"	29	"	—Wednesday
March	1	"	—Thursday
"	2	"	—Friday

It appears from all the testimony adduced by both sides that the *S.S. American Shipper* arrived at the Port of London, England, and that the petitioner demanded his discharge and wages earned and also one month's additional pay and transportation back to the United States,

on Sunday morning, February 26, 1928 (R., 14, 15, 34, 40, 41, 93).

The respondent's own witness, Captain Cummings, testified that at the time the transactions involved herein took place he made a record in the ship's log of what had happened. He stated:

> "Q. Upon returning to New York, did you file the report of the *McCrea* case with any department or official here?"
>
> "A. I made the usual log book entry in the Official Log Book, and reported down to the Customs House and to the United States Shipping Commissioner."
>
> "Q. Does that report contain the names of the crew?"
>
> "A. Merely incidental to the *McCrea* case. It contains nothing else; no other reference" (R., 51).

The entry in the log book in relation to this matter was admitted in evidence as Respondent's Exhibit A over the objection of the proctor for the petitioner (R., 34). The trial judge said, however:

> "The Court: I will take it simply as a *contemporary* entry in the official record of the ship of the *captain's version* of this transaction." (R., 34, italics ours.)

The entry in the log book was marked "Respondent's Exhibit A" and appears on page 93 of the record as follows:

> "McCrea, Livingston H., Fireman #44. For being absent from ship and duty without proper permission on Feb. 28th, and though aboard ship from 3:20 P. M. Feb. 29th to 9:00 A. M. March 1st, 1928 he failed to turn to on those days. Failed to join ship at time of sailing from London and therefore declared a Deserter March 1st having last been seen aboard ship at 9:00 A. M. March 1st, 1928. Total lost time three (3) days. Logged and fined (six) days' pay. $13.00.
>
> (Signed) SCHUYLER F. CUMMINGS, Master (Signed)
>
> W. SWARTRIDGE, Ch. Engineer."

It thus appears from the official log book entry, made by the master at the time of the occurrences herein involved, that the petitioner was on board the ship on and between February 26 and March 1; that he was charged with having failed to turn to on February 28, 29 and March 1; and that he was declared a deserter on March 1, *having been seen* aboard ship on that day. It also appears that he was fined six days' pay for refusing to turn to on February 28 and 29 and March 1, although he was aboard ship during those days; and that the master and other officers of the vessel knew he was there, and fined him for a full day March 1.

By his continued refusal to turn to, the petitioner evinced his persistence in his demand for his formal discharge and for his wages earned as of February 26, the date of his demand. By his remaining on board the vessel for four days after his demand, he gave the master any necessary opportunity to pay him the wages due within the time allowed the master under the statute.

Although in the log book entry the petitioner was charged with being absent from ship and duty "without proper permission" on February 23, his own testimony shows that he was on the vessel on that day, and tried to find the master (R., 15), looking all over the ship (R., 26).

The record shows that the master cleared his ship and sailed March 2 (R., 43, 44, 87). The master states that he made his report of desertion in relation to this matter when he returned to the Port of New York (R., 43, 51).

When the petitioner demanded his discharge and wages earned the master said he would not discharge him (R., 15). The District Court found that at that time the master declined to comply with the petitioner's request (R., 106).

There is no evidence in the record that the master ever took up the question of the petitioner's discharge with the consul, or attempted to ascertain the law. The only inquiry of the master, at the consulate on February 27, was whether McCrea had been there (R., 42). There

is no evidence that the master ever determined to pay the wages earned. In fact, the evidence of the respondent shows that, although it was known to the master or officers of the vessel that the petitioner was on the vessel for four days after his demand for his wages, the master made no effort to see him, neglected to pay him, and the petitioner was ordered to turn to as one of the crew and was fined six days' pay for not doing so (Respondent's Exhibit A, R., 93).

On March 2, the master accepted a letter from the vice-consul, to be delivered to the petitioner on board the *S.S. American Shipper* (R., 84).

As is shown by the record, the petitioner understood and believed that he was to meet the master at the office of the consul on the morning of February 27 (R., 15, 19). It is also shown that he did go to the consulate on that morning, and waited there several hours (R., 15, 21, 22). While at the consul's office, he was told by the consul that he could not see Captain Cummings (R., 22, 23). It would appear from the testimony of the respondent's witness, the vice-consul, Daniel Miller, that, at the time the petitioner was in the office, Captain Cummings was there, "about an hour before McCrea had left" (R., 87). The only testimony of the respondent's witness, Lowell C. Pinkerton, American Consul, was (R., 74):

> "Q. Was Captain Cummings present at any time when McCrea was at your office?"
>
> "A. I did not see Captain Cummings at any time while I was talking to McCrea."

The master himself testified that he had told the petitioner he would be at the consulate "some time not long after noon" (R., 41). He claims that he did not reach there until 2 o'clock (R., 41).

While at the consulate, the petitioner was requested to present a statement in writing of his charges, which he did (R., 23, 84, Respondent's Exhibit B, attached to depo-

sitions of the consul and vice-consul, Pinkerton and Miller, R., 96, 95). The petitioner returned to his ship, and prepared and sent a written statement of his complaint from the ship on February 29. Exhibit B shows that the statement requested was written February 29, 1928, and that the seaman's address was still "'*S.S. American Shipper'*, Surrey Docks, London, England" (R., 96). The petitioner was anxious to receive a written statement from the consul (R., 23), which he had been promised would be sent him when he had made his own statement in writing (R., 23, 74). As is shown by the evidence submitted by the respondent (Respondent's Exhibit A, R., 93, and Respondent's Exhibit B, attached to depositions of Pinkerton and Miller, R., 96), he remained on board the *S.S. American Shipper,* and gave that as his address where a reply might be received up to March 1. He made strenuous efforts to see the captain on board ship (R., 15, 16, 26). The written statement of the petitioner was received at the consulate February 29 (R., 84), and a written reply was prepared March 1 (R., 84).

The opinion of the court that the petitioner did not remain on board the vessel for four days after he made his demand, may be predicated upon the statement in the opinion of the District Court that the petitioner departed the ship, without seeing the master, the day after presenting his oral demand at the office of the American Consul, and that the day after he abandoned the ship his written complaint was received at the consulate (R., 106). This statement in the decision of the District Court is not correct, and is not based on the facts shown in the record. On the trial, the petitioner was testifying to facts which had taken place about four years before. While the petitioner, in answer to the question on cross-examination, "When did you leave the ship?" testified "I think it was February 28" (R., 21), and further in answer to a question by the District Attorney, "That was on Tuesday, wasn't it?" testified, "Monday or Tuesday, I forget," it appears from the records made by the master, at the time of the occur-

rences referred to, that the petitioner was on board the *S.S. American Shipper* up to and including March 1. The trial court received the ship's log as a *contemporary* record (R., 34). The ship's log (Respondent's Exhibit A, R., 93) is an admission by the respondent that the petitioner was on board the *S.S. American Shipper* up to and including March 1, and was fined six days' pay for refusing to turn to on February 28, 29 and March 1. Furthermore, the written statement sent by the petitioner to the American Consul on February 29, showed he was at that time on the vessel, and gave it as his address.

Assignments of error were taken to the statement or finding contained in the decision of the District Court that the petitioner did not remain on board the *S.S. American Shipper,* and could not have been paid by the master within four days after the demand was made (R., 121, Assignments of Error, 19, 20, 21, 22; R., 137-138, Assignments of Error, 19, 20, 21, 22).

The further holding of the District Court that double pay for wages withheld should run from the time of the petitioner's making a second demand for wages when this action was begun, seemed conclusive as to the petitioner's right to come in under the statute. The only question raised by the respondent, as to this finding of the court, was that the relief afforded was a penalty and could not be recovered against the United States. In its opinion the District Court stated (R., 107):

> "Consequently, assuming that within the statute libellant may be deemed to have received his discharge on the day upon which he demanded it, the captain still had four days within which to make payment."

The petitioner was discharged by operation of law and not by any act of the master. *The time for payment only* was delayed for four days. The respondent raised no question as to "reasonable cause", filed no assignments of

error, and took no appeal. In the opinion of the Circuit Court of Appeals it is said (R., 148):

> "The decision of the District Court that the appellant was not entitled to any double pay was put on the ground that such requirement of the statute was a penalty and not recoverable from the United States."

The question of the exact date when the petitioner left the vessel was not raised either in the brief submitted by the respondent in the Circuit Court of Appeals or in this court, or in the argument in either court. The facts above submitted were not, therefore, called to the attention of this court.

In the cases of *O'Hara* v. *Luckenbach S.S. Co.* (269 U. S. 364; 1 Fed. [2] 923), *Southern Pacific Co.* v. *Ha r et al* (24 Fed. [2] 94), *El Ostero* (14 Fed. [2] 349), *Strathearn S.S. Co.* v. *Dillon* (256 Fed. 631; 252 U. S. 348), *Thompson* v. *Lucas* (252 U. S. 358), the seamen left the vessel as soon as their demand for their wages had been refused, and began suit. Yet it was held that they were entitled to recover.

It further appears from the record that the petitioner was on board the *S.S. American Shipper* more than twenty-four hours after the cargo had been discharged, and that the master or other officers knew he was there. As appears from Respondent's Exhibit A (R., 93), the petitioner was on board the vessel March 1. The master testified that he cleared his ship on Friday morning, March 2 (R., 44, 43, 87). To clear his ship the master must have discharged his cargo and taken on a new cargo. The ship had been in port since Sunday, February 26. It thus appears that the cargo must have been discharged at least twenty-four hours before the petitioner left the vessel.

It is therefore respectfully submitted that the petition for a rehearing be granted and that, upon further consideration of the case, the petitioner be given the

relief requested in the original petition, for the reason that the court overlooked or misapprehended the facts shown by the record; that the decision of the court in relation to this matter was predicated upon facts which are erroneous; and that it appears from the record that the captain or other officers knew the petitioner was on the vessel for at least four days after his demand was made, and had opportunity to make payment of the wages.

The issues involved herein are of great importance to all seamen and must eventually be determined by this court. The decisions in the lower courts, as to whether the relief provided by R. S. 4529 (46 U.S.C. 596) is compensatory or a penalty, or, if a penalty, whether waived by the United States going into commercial business in competition with others or by virtue of the Suits in Admiralty Act, are conflicting, and should be determined by this court. These issues have been passed upon by the lower courts in this case, but their decisions are in conflict with those of other courts. The arguments upon these issues have been fully presented to this court both on behalf of the petitioner and on behalf of the respondent. The petitioner's contentions in relation thereto are found in "Brief of Petitioner", submitted on the argument, especially Point I (pp. 12-17), Point II (pp. 17-32), and Point III (pp. 32-42).

Conclusion.

For the foregoing reasons it is respectfully urged that this petition for rehearing be granted; that, upon the granting of the petition for rehearing, and upon the reargument of the case, the decree herein be modified to hold that the refusal to pay the wages of the petitioner was without sufficient cause; that a decision be rendered upon the questions whether or not the relief provided by R. S. 4529 (46 U.S.C. 596) is wages or compensation, or a penalty, and whether, if a penalty, the respondent, the United States, waived any sovereign immunity it had by

going into commercial business in competition with others or by virtue of the Suits in Admiralty Act of March 9, 1920, Chap. 9, Secs. 1, 2, 6 (46 U.S.C. 741, 742, 746); and that the petitioner have judgment accordingly, and such other and further relief as he may be entitled to receive.

JOHN M. SCOBLE,
Proctor for Petitioner.

K. COURTENAY JOHNSTON,
Of Counsel.

I, JOHN M. SCOBLE, Proctor for the above named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for the purpose of delay.

JOHN M. SCOBLE.